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Pos Logistics Bhd (formerly known as Konsortium Logistic Bhd) v Kumpulan Perubatan Smarthealth Sdn Bhd

B

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12BNCVC-86–10 OF 2018
WONG KIAN KHEONG J
3 SEPTEMBER 2019

C

Contract — Service contract — Termination — Plaintiff provided medical out-patient services to employees of defendant — Defendant failed to pay total outstanding balance — Whether plaintiff could enforce running account under Contracts Act 1950 against defendant — Whether plaintiff had proven that total
D *outstanding balance was due from defendant — Whether defendant's redaction attracted adverse inference under s 114(g) of the Evidence Act 1950 — Whether plaintiff entitled to charge late fee interest — Whether defendant was estopped from denying total outstanding balance*

E

The plaintiff had provided medical out-patient services to the employees of the defendant. The plaintiff filed this suit in the sessions court to recover, among others, a sum of RM865,318.31 ('the total outstanding balance') which was allegedly owed by the defendant to the plaintiff regarding the services. The plaintiff's witness had testified, among others, that the plaintiff had provided
F the services to the defendant for which monthly invoices had been issued by the plaintiff to the defendant which stated that the payment of the sums stated in the invoices ('the invoiced sums') should be made within 14 days from the date of the invoices. When the defendant did not pay the invoiced sum or was late in such a payment, the plaintiff would impose late fee interest that would be
G added to the invoiced sum and the total of the invoiced sum and late fee interest ('the outstanding balance') would be carried forward to the following invoice. The defendant only made certain part payments of the outstanding balance ('the defendant's part payments') and did not pay the total outstanding balance. Hence, the plaintiff terminated the services and demanded for the defendant to
H pay the total outstanding balance. However, the defendant failed to do so. To oppose the suit, the defendant's witness stated that the defendant had paid all the invoiced sums to the plaintiff ('the alleged full payment') and adduced documents to prove it. The defendant's statement of accounts and defendant's bank statements had been unilaterally redacted by the defendant ('the
I defendant's redaction'). The learned sessions court judge gave judgment in favour of the plaintiff and hence this appeal by the defendant. The issues for consideration were: (a) whether the plaintiff could enforce running account under the Contracts Act 1950 ('the CA') against the defendant; (b) whether the plaintiff had proven that the total outstanding balance was due from the

defendant; (c) whether the defendant's redaction attracted adverse inference under s 114(g) of the Evidence Act 1950 ('the EA'); (d) whether the plaintiff was entitled to charge late fee interest; and (e) whether the defendant was estopped from denying total outstanding balance.

Held, dismissing the appeal:

(1) The plaintiff was entitled to enforce a running account against the defendant regarding the services. When an employee of the defendant sought medical out-patient service from the plaintiff, this constituted an offer or a 'proposal' within the meaning of s 2(a) of the CA. The plaintiff then accepted this proposal as understood in s 2(b) of the CA. When the plaintiff provided the services to the defendant, the services formed the 'consideration' under s 2(d) of the CA. Once the services had been provided by the plaintiff to the defendant, the defendant was legally bound to pay the invoiced sums. If an invoiced sum ('the first invoiced sum') was not paid by the defendant to the plaintiff, the first invoiced sum was carried forward to the next invoice ('the second invoice') in the sense that the first invoiced sum was added to the second invoiced sum to form the outstanding balance due from the defendant to the plaintiff at the time of the second invoice. In this sense, the account between the plaintiff and defendant was 'running' and enabled the plaintiff to provide the services although the defendant had not paid the first invoiced sum (see para 10).

(2) A running account may be enforced under the CA as there was nothing in CA which, either expressly or by necessary implication, prohibited the enforceability of a running account. The statement of claim had pleaded sufficient particulars of the running account between the plaintiff and defendant which formed the basis of this action. Furthermore, the plaintiff had adduced as evidence all the invoices in support of the statement of claim. Hence, the defendant could not claim to be surprised by this action based on a running account (see para 10).

(3) The total outstanding balance was based on contemporaneous documentary evidence, namely the invoices. The plaintiff had sent three demands for the defendant to pay the sums due to the plaintiff for the services at the material time. The defendant admitted receipt of the three demands but did not deny the three demands by relying on the alleged full payment. The effect of the defendant's failure to deny the three demands was most telling. The sessions court had not committed a plain error of fact in finding that the defendant owed the total outstanding balance to the plaintiff (see para 11).

(4) The defendant had not obtained a redaction order in respect of the redacted material in the defendant's statements of accounts and defendant's bank statements. Nor did the defendant seek a protective

order in this case. Accordingly, an adverse inference under s 114(g) of the EA should had been made against the defendant regarding the defendant's redaction (see para 16).

(5) The plaintiff was entitled to charge late fee interest because there existed a course of business dealing between the plaintiff and defendant wherein the defendant had agreed to pay late fee interest. The defendant's employees continued to seek the services without any objection to the late fee interest and the defendant's part payments had been made without any protest against the late fee interest (see para 21).

(6) The defendant did not notify the plaintiff at all that the invoiced sums and late fee interest were wrongly or erroneously stated in the invoices. The defendant's omission had caused detriment to the plaintiff because the plaintiff continued to provide the services for the period without any substantial payment by the defendant. As such, the defendant was estopped by the defendant's omission from denying the total outstanding balance, either in respect of the invoiced sums or late fee interest (see para 22).

[Bahasa Malaysia summary

Plaintif telah memberikan perkhidmatan perubatan pesakit luar kepada pekerja defendan. Plaintif mengemukakan saman ini di mahkamah sesyen untuk mendapatkan kembali, antara lain, sejumlah RM865,318.31 ('jumlah baki tertunggak') yang didakwa dihutang oleh defendan kepada plaintif mengenai perkhidmatan tersebut. Saksi plaintif telah memberi keterangan, antara lain, bahawa plaintif telah memberikan perkhidmatan kepada defendan yang mana invois bulanan telah dikeluarkan oleh plaintif kepada defendan yang menyatakan bahawa pembayaran jumlah yang dinyatakan dalam invois ('jumlah invois') hendaklah dibuat dalam masa 14 hari dari tarikh invois. Apabila defendan tidak membayar jumlah invois atau terlambat dalam pembayaran tersebut, plaintif akan mengenakan faedah bayaran lewat yang akan ditambahkan ke jumlah invois dan jumlah invois dan faedah bayaran lewat ('baki tertunggak') akan dibawa ke invois berikutnya. Defendan hanya membuat sebahagian pembayaran dari baki tertunggak ('sebahagian pembayaran defendan') dan tidak membayar keseluruhan baki tertunggak. Oleh itu, plaintif menghentikan perkhidmatan dan menuntut defendan membayar jumlah baki tertunggak. Bagaimanapun, defendan gagal melakukannya. Untuk menentang guaman tersebut, saksi defendan menyatakan bahawa defendan telah membayar semua jumlah invois kepada plaintif ('pembayaran penuh yang didakwa') dan mengemukakan dokumen untuk membuktikannya. Penyata akaun defendan dan penyata bank defendan telah disunting secara sepihak oleh defendan ('suntingan defendan'). Hakim mahkamah sesyen yang bijaksana memberikan penghakiman berpihak kepada plaintif dan oleh itu rayuan ini oleh defendan. Isu-isu untuk pertimbangan adalah: (a) sama ada plaintif dapat menguatkuasakan akaun berlangsung di

bawah Akta Kontrak 1950 ('Akta') terhadap defendan; (b) sama ada plaintif telah membuktikan bahawa jumlah baki tertunggak adalah terhutang daripada defendan; (c) sama ada suntingan defendan menarik inferens berbalik di bawah s 114(g) Akta Keterangan 1950 ('AK'); (d) sama ada plaintif berhak mengenakan faedah bayaran lewat; dan (e) sama ada defendan dihalang daripada menafikan jumlah baki tertunggak.

Diputuskan, menolak rayuan:

(1) Plaintif berhak untuk menguatkuasakan akaun berlangsung terhadap defendan mengenai perkhidmatan tersebut. Apabila pekerja defendan mendapatkan perkhidmatan perubatan pesakit luar daripada plaintif, ini merupakan tawaran atau 'cadangan' dalam maksud s 2(a) Akta. Plaintif kemudiannya menerima cadangan ini seperti yang difahami dalam s 2(b) Akta. Apabila plaintif memberikan perkhidmatan kepada defendan, perkhidmatan tersebut membentuk 'pertimbangan' di bawah s 2(d) Akta. Setelah perkhidmatan diberikan oleh pihak plaintif kepada defendan, defendan secara sah harus membayar jumlah invois. Sekiranya jumlah invois ('jumlah invois pertama') tidak dibayar oleh defendan kepada plaintif, jumlah yang invois pertama akan dibawa ke invois berikutnya ('invoice kedua') dalam erti bahawa jumlah invois pertama ditambahkan hingga jumlah invois kedua untuk membentuk baki tertunggak yang terhutang daripada defendan kepada plaintif pada masa invois kedua. Dalam pengertian ini, akaun antara plaintif dan defendan 'berlangsung' dan membolehkan plaintif memberikan perkhidmatan walaupun defendan belum membayar jumlah invois pertama (lihat perenggan 10).

(2) Akaun berlangsung boleh dikuatkuasakan di bawah Akta kerana tiada apa-apa di dalam Akta yang, baik secara tersurat atau dengan implikasi yang perlu, melarang pelaksanaan akaun berlangsung. Penyataan tuntutan tersebut telah mengemukakan cukup banyak maklumat mengenai akaun berlangsung antara plaintif dan defendan yang menjadi asas kepada tindakan ini. Selanjutnya, plaintif telah mengemukakan sebagai bukti semua invois yang menyokong pernyataan tuntutan. Oleh itu, defendan tidak boleh mendakwa terkejut dengan tindakan ini berdasarkan akaun berlangsung (lihat perenggan 10).

(3) Jumlah baki tertunggak adalah berdasarkan keterangan dokumentari lazim, iaitu invois. Plaintif telah menghantar tiga tuntutan kepada defendan untuk membayar sejumlah wang yang perlu dibayar kepada plaintif untuk perkhidmatan tersebut pada waktu yang material. Defendan mengakui penerimaan ketiga-tiga tuntutan tersebut tetapi tidak menolak ketiga-tiga tuntutan tersebut dengan bergantung pada pembayaran penuh yang didakwa. Kesan daripada kegagalan defendan untuk menolak ketiga-tiga tuntutan itu sangat jelas. Mahkamah sesyen

tidak melakukan kesalahan fakta yang nyata dalam menemukan bahawa defendan berhutang dengan jumlah baki tertunggak kepada plaintif (lihat perenggan 11).

(4) Defendan tidak mendapatkan perintah suntingan berkenaan dengan material yang telah disunting dalam penyata akaun defendan dan penyata bank defendan. Tidak juga defendan meminta perintah perlindungan dalam kes ini. Oleh itu, inferens berbalik di bawah s 114(g) AK seharusnya dibuat terhadap defendan mengenai suntingan defendan (lihat perenggan 16).

(5) Plaintif berhak untuk mengenakan faedah bayaran lewat kerana terdapat urusan perniagaan antara plaintif dan defendan di mana defendan telah bersetuju untuk membayar faedah bayaran lewat. Pekerja defendan terus menggunakan perkhidmatan tanpa ada bantahan terhadap faedah bayaran lewat dan pembayaran sebahagian defendan telah dilakukan tanpa ada bantahan terhadap faedah bayaran lewat (lihat perenggan 21).

(6) Defendan sama sekali tidak memberitahu plaintif bahawa jumlah invois dan faedah bayaran lewat dinyatakan dengan salah dalam invois. Peninggalan defendan telah menyebabkan kerugian kepada plaintif kerana plaintif terus memberikan perkhidmatan untuk tempoh tersebut tanpa pembayaran oleh defendan. Oleh yang demikian, defendan dihalang oleh kelalaian defendan daripada menafikan jumlah baki tertunggak, baik berkenaan dengan jumlah invois atau faedah bayaran lewat (lihat perenggan 22).]

Cases referred to

Bajaj Textiles Ltd v Gian Singh & Co Ltd [1971] 2 MLJ 133, PC (folld)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (folld)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
EON Bank Bhd v Sri Tanjong Travel Sdn Bhd & Ors [2014] 5 AMR 693, HC (refd)
Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985) [2018] 4 MLJ 284; [2019] 2 CLJ 592, CA (refd)
Footman Bower & Co Ltd, Re [1961] 2 All ER 161, Ch D (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)
Henry, Marquis of Anglesey Willmot v Gardner, In re [1901] 2 Ch 548, CA (refd)
Jetara Sdn Bhd v Maju Holdings Sdn Bhd [2007] 3 MLJ 609; [2007] 3 CLJ 41, CA (refd)

Kingtime International Ltd & Anor v Petrofac E & C Sdn Bhd [2019] MLJU 731, HC (refd)
Malayan Banking Bhd v Wembley Industries Holdings Bhd [2012] MLJU 91; [2012] 5 CLJ 956, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (consd)
WW Duncan & Co, In re [1905] 1 Ch 307, Ch D (refd)

Legislation referred to

Contracts Act 1950 ss 1(2), 2(a), (b), (d)
Evidence Act 1950 ss 8(2), 114(g), 115
Rules of Court 2012 O 92 r 4

Nadzarin bin Wok Nordin (Tan Lay Kuan with him) (Nadzarin Kuok Puthucheary & Tan) for the appellant.
Mohd Hisham bin Mohd Nazir (Ilyasa Iqbal bin Abu Bakar with him) (Hisham Nazir & Co) for the respondent.

Wong Kian Kheong J:

A. INTRODUCTION

[1] This appeal raises a novel question of whether a 'running account' can be enforced under the Contracts Act 1950 ('the CA').

B. BACKGROUND

[2] I will refer to parties as they are in the sessions court ('SC').

[3] The plaintiff company ('the plaintiff') had provided medical out-patient services ('services') to the employees of the defendant company ('the defendant') from 1 February 2013–31 October 2015 ('period (services)').

[4] The plaintiff files this suit in SC to recover, among others, a sum of RM865,318.31 which is allegedly owed by the defendant to the plaintiff regarding the services ('this action').

[5] To support this action, the plaintiff has called one witness, Mr Dakshin Rajkumar, the plaintiff's general manager ('SP1'). SP1 has testified, among others, as follows:

(a) the plaintiff had provided the services to the defendant for which monthly invoices had been issued by the plaintiff to the defendant ('invoices');

A (b) the invoices stated that, among others:

(i) payment of the sums stated in the invoices ('invoiced sums') should be made within 14 days from the date of the invoices;

B (ii) all items and balances shown in the invoices 'will be considered correct unless [the Plaintiff is] notified in writing of any discrepancies within 14 days' from the date of the invoices; and

(iii) the plaintiff reserves the 'right to charge an overdue interest of 2% per month on all outstanding balances' ('late fee interest');

C (c) when the defendant did not pay the invoiced sum or was late in such a payment, the plaintiff would impose late fee interest. The late fee interest would be added to the invoiced sum and the total of the invoiced sum and late fee interest ('outstanding balance') would be carried forward to the following invoice;

D (d) the defendant only made certain part payments of the outstanding balance ('the defendant's part payments'). The plaintiff deducted the defendant's part payments from the outstanding balance;

E (e) the defendant did not pay a total outstanding balance of RM865,318.31 ('total outstanding balance'). Hence, the plaintiff terminated the services on 30 November 2015 ('termination of services'); and

(f) the plaintiff had demanded for the defendant to pay the total outstanding balance. However, the defendant had failed to do so.

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[6] To oppose this suit, the defendant's Vice-President II, Finance Department, Puan Fitriah bt Hamdan ('SD1'), gave the following evidence, among others:

G (a) the defendant had paid all the invoiced sums to the plaintiff ('alleged full payment'); and

(b) to prove the alleged full payment, SD1 adduced the following documents:

H (i) the defendant's bank-in slips;

(ii) the defendant's statement of accounts ('the defendant's statements of accounts'); and

I (iii) bank statements of the defendant ('the defendant's bank statements').

The defendant's statements of accounts and defendant's bank statements had been unilaterally redacted by the defendant ('the defendant's redaction'). I will discuss the effect of the defendant's redaction in Part F below.

[7] After a trial of this action, the learned SC judge ('SCJ') gave judgment in favour of the plaintiff ('SC judgment') as follows: A

(a) the defendant shall pay the total outstanding balance to the plaintiff;

(b) the defendant shall pay to the plaintiff interest at the rate of 5%pa on the total outstanding balance from the date of SC judgment until the full payment of the total outstanding balance; and B

(c) costs of RM10,000 shall be paid by the defendant to the plaintiff.

[8] The defendant has appealed to this court against the SC judgment ('this appeal'). C

C. ISSUES

[9] This appeal raises the following questions: D

(a) can the plaintiff enforce a running account against the defendant in respect of the services under CA?

(b) whether the plaintiff has proven that the total outstanding balance is due from the defendant to the plaintiff. In this regard: E

(i) has the defendant paid all the invoiced sums?

(ii) does the defendant's redaction attract an adverse inference against the defendant under s 114(g) of the Evidence Act 1950 ('the EA')?

(iii) is the plaintiff entitled to charge late fee interest due to the existence of a course of dealing between the plaintiff and defendant? and F

(iv) is the defendant estopped from denying the total outstanding balance?

D. WHETHER THE PLAINTIFF CAN ENFORCE RUNNING ACCOUNT UNDER THE CA AGAINST THE DEFENDANT G

[10] I am of the view that the plaintiff is entitled to enforce a running account against the defendant regarding the services. This decision is premised on the following reasons: H

(a) when an employee of the defendant sought medical out-patient service from the plaintiff, this constituted an offer or a 'proposal' within the meaning of s 2(a) of the CA (*when (the defendant) signifies to (the plaintiff) (the defendant's) willingness to (seek the services) with a view to obtaining the assent of (the plaintiff) to (perform the services)*). The plaintiff then accepted this proposal as understood in s 2(b) of the CA (*when (the plaintiff) to whom the proposal is made signifies (the plaintiff's) assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise*); I

(b) when the plaintiff provided the services to the defendant, the services formed the 'consideration' under s 2(d) of the CA (*when, at the desire of the promisor (the defendant), the promisee (the plaintiff) … has done (performance of the services), such act is called a consideration for the promise*). Once the services had been provided by the plaintiff to the defendant, the defendant was legally bound to pay the invoiced sums;

(c) if an invoiced sum ('first invoiced sum') is not paid by the defendant to the plaintiff, the first invoiced sum is carried forward to the next invoice ('second invoice') in the sense that the first invoiced sum is added to the second invoiced sum to form the outstanding balance due from the defendant to the plaintiff at the time of the second invoice. In this sense, the account between the plaintiff and defendant is 'running' and enables the plaintiff to provide the services although the defendant has not paid the first invoiced sum. Running accounts facilitate commerce by:

(i) allowing manufacturers, wholesalers, vendors, suppliers and/or service providers to provide goods and/or services to their customers in a course of commercial dealing over a period of time; and

(ii) giving time for the customers to pay for the goods and/or services (subject to the imposition of interest);

(d) when the defendant fails to pay or is late in the payment of the invoices sums, the plaintiff is entitled to impose late fee interest — please see Part H below;

(e) the defendant's part payments are utilised to deduct the outstanding balance at the time of the defendant's part payments. The defendant's part payments *cannot* be used to deduct:

(i) any particular invoiced sum; or

(ii) a specific item in an invoice.

I rely on the following cases:

(1) in the Court of Appeal case of *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)* [2018] 4 MLJ 284; [2019] 2 CLJ 592 at para [32], Tengku Maimum Tuan Mat JCA (as she then was) followed Lee Swee Seng JC's (as he then was) decision in *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91; [2012] 5 CLJ 956 at para [37] as follows:

> [32] Before we proceed with the main issues, we wish to state at the outset that *we find no appealable error in respect of the learned judge's finding that the plaintiff's claim is based on a running account. In Wembley Industries Holdings Bhd, it was held*:
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> > *… a running account is a single account and not a composite of its various parts. A payment made on account of a running account is in respect of the*

entire outstanding balance, with the result that time is extended for the whole of the debt. It appears, therefore that a running account will become statute-barred only if more than six years elapse between the supply of the last article under it and the last payment on account. (Emphasis added.); and

(2) Buckley J (as he then was) in the United Kingdom's ('UK') High Court decided as follows in *Re Footman Bower & Co Ltd* [1961] 2 All ER 161 at p 165:

> *When, as in the present case, there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then, if the debtor makes a payment 'generally on account' it appears to me that he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment 'on account' imports an acknowledgment of a liability for a larger sum (see Friend v Young* [1897] 2 Ch 436*, per Stirling J). When a payment is merely stated to be 'on account' without the liability on account of which it is made being specified, one must first inquire what liabilities on the part of the payer to the recipient exist. If, on inquiry, it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance.* (Emphasis added.);

(f) the enforceability of a running account has been recognized by the Privy Council in *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 (an appeal from Singapore). Lord Pearson gave the following judgment in *Bajaj Textiles* at pp 134–135:

> *Thus it was common ground between the plaintiffs and the defendants that there was a running account between them, and the dispute was as to the scope of it.*
>
> ...
>
> *The plaintiffs contended that there is no such claim known to the law as a claim on a running account. Both the judge and the Federal Court rejected this contention. In Their Lordships' opinion a claim on a running account would be insufficient as a matter of pleading unless particulars were given either of an account stated (the parties having agreed the amount outstanding) or of the mutual transactions from which the outstanding balance arose. In the present case there was no evidence of an account stated, but extensive particulars were given of the mutual transactions from which the outstanding balance was alleged to have arisen.* (Emphasis added.)

I have no hesitation to follow *Bajaj Textiles* and decide that a running account may be enforced under the CA. This is because firstly, there is nothing in the CA which, either expressly or by necessary implication, prohibits the enforceability of a running account. Secondly, s 1(2) of the CA provides that 'Nothing herein contained shall affect ... any incident of any contract, not inconsistent with [CA]'.

Thirdly, I am not aware of any Malaysian case which has rejected the enforceability of a running account. On the contrary, the Court of Appeal in *Ekuiti Setegap* has recognised the enforceability of a running account. Fourthly, running accounts have been applied in the borderless world of commerce and to decide that a running account is not enforceable under our CA, is not only anomalous but is also unjust to the business community in this country. Fifthly, our law on commerce should, as far as possible, be consistent with commercial law of other countries which has recognised the enforceability of running accounts. Lastly, our commercial laws should facilitate and not hinder commercial transactions (such as running accounts); and

(g) in para 5 of the statement of claim ('SOC') of this action, the plaintiff has pleaded in great detail regarding the running account between the plaintiff and defendant in respect of the services. The SOC has pleaded the following:

(i) dates;

(ii) description — invoice numbers and late fee interest;

(iii) amounts debited by the plaintiff;

(iv) amounts credited by the plaintiff, namely the defendant's part payments; and

(v) the balance due from the defendant to the plaintiff on a particular date.

In compliance with *Bajaj Textiles*, the SOC has pleaded sufficient particulars of the running account between the plaintiff and defendant which forms the basis of this action. Furthermore, the plaintiff has adduced as evidence all the invoices in support of the SOC. Hence, the defendant cannot claim to be surprised by this action based on a running account. In any event, the nub of the defence in this case is that the defendant has paid all the invoiced sums.

E. HAS THE PLAINTIFF PROVEN TOTAL OUTSTANDING BALANCE WAS DUE FROM THE DEFENDANT?

[11] I have no hesitation to affirm the learned SCJ's finding of fact that the plaintiff has proven on a balance of probabilities that the total outstanding balance is due from the defendant to the plaintiff. This decision is supported by the following evidence and reasons:

(a) the total outstanding balance is based on contemporaneous documentary evidence, namely the invoices. When there is a conflict between oral and documentary evidence, the court should accept the latter — please see the judgment of Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234;

(b) the plaintiff had sent three demands dated 30 June 2016, 30 November 2016 and 31 December 2016 for the defendant to pay the sums due to the plaintiff for the services at the material time ('three demands'). The defendant admitted receipt of the three demands but did not deny the three demands by relying on the alleged full payment. The effect of the defendant's failure to deny the three demands is most telling. I rely on Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 288; [1995] 4 CLJ 155 at p 159, as follows:

> *During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.*
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> *In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479 at p 487:
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> > In *Wiedemann v Walpole* [1891] 2 QB 534 at p 537, an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher MR, in his judgment, remarked:
> >
> > > Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise. (Emphasis added.) Earlier, in his judgment, he said, *'Now there are cases — business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'. (Emphasis added.)
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> *David Wong Hon Leong* has been affirmed by Hasan Lah JCA (as he then was) in the Court of Appeal in *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609 at p 618; [2007] 3 CLJ 41 at p 55; and

(c) as a general rule, an appellate court shall not intervene regarding a trial court's findings of fact unless there is a plain error of fact by the trial court which has caused an injustice and warrants appellate intervention — please see the judgment of Steve Shim CJ (Sabah and Sarawak) in the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at pp 7–11; [2004] 4 CLJ 309 at pp 317–321.

Sitting in an appellate capacity, I am of the view that the SC has not committed a plain error of fact in finding that the defendant owes the

total outstanding balance to the plaintiff. In making such a factual finding, the learned SCJ has had the audio-visual advantage of:

(i) listening to the evidence of SP1 and SD1; and

(ii) assessing the demeanour of SP1 and SD1.

F. WHETHER THE DEFENDANT'S REDACTION ATTRACTS ADVERSE INFERENCE UNDER S 114(G) OF THE EA

[12] The alleged full payment relies on the defendant's statements of accounts and defendant's bank statements (both with the defendant's redaction). The question that arises is what is the effect of the defendant's redaction in this case?

[13] It is decided in *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621 at para [26], as follows:

> [26] *I am of the following view regarding redaction of documents which are exhibited in affidavits in an OS:*
>
> (1) *a party should not have unilaterally redacted a document exhibited in an affidavit without leave of the court under* O 38 r 2(2) *of the RC. The phrase 'unless … the Court otherwise directs' in* O 38 r 2(2) *of the RC empowers the court to allow a party to apply for leave of the court to redact an exhibit in an affidavit (redaction application);*
>
> (2) *in a redaction application, the court has the power to inspect the unredacted document to ensure that the redaction application is made in good faith and for a valid reason, for example, to ensure confidentiality of a party's information or to avoid publication of offensive, indecent or scandalous material. The party opposing the redaction application is not entitled to inspect the unredacted document, unless permitted by the applicant in the redaction application; and*
>
> (3) *if a party has unilaterally redacted a document exhibited in an affidavit without leave of the court:*
>
> (a) *the court is in the dark as to what are the contents of the redaction and is therefore not in a position to decide on the redacted exhibit;* and
>
> (b) *the opposing party is not in a position to answer regarding the redacted document. Accordingly, no adverse inference can be made against the opposing party for his or her failure to reply to a redacted exhibit in an affidavit.* (Emphasis added.)

[14] *Tokai Corporation* concerns an originating summons but I am of the view that *Tokai Corporation* should also apply to documents adduced at trials. If a party ('X') wishes to redact a document to be tendered as evidence at a trial due to, for example, the fact that the document contains information which X

considers confidential ('confidential information'):

(a) X should not have unilaterally redacted the document without leave of the trial court;

(b) X should apply to the trial court under O 92 r 4 of the Rules of Court 2012 ('the RC'), the court's inherent jurisdiction or power to redact the document ('redaction application');

(c) in a redaction application:

(i) the trial court can inspect the unredacted document to ensure that the redaction application is made in good faith by X and for a valid reason, for example, to ensure that confidential information is not disclosed to the detriment of X;

(ii) the opposing party in the trial in question ('Y') is not entitled to inspect the unredacted document, unless permitted by X;

(iii) X is only required to serve on Y the redaction application and the supporting affidavit in so far as there is no disclosure of confidential information; and

(iv) Y is entitled to:

(1) attend the hearing of the redaction application;

(2) hear X's submission in support of the redaction application (subject to the court's power to exclude disclosure of confidential information); and

(3) reply to X's submission and oppose the redaction application;

(d) the court has a discretionary power to grant the redaction application in the interest of justice ('redaction order'); and

(e) if X adduces as evidence in a trial a document which has been unilaterally redacted by X (without a redaction order), Y may invite the court to draw an adverse inference against X under s 114(g) of the EA in respect of the redacted material. Section 114(g) of the EA provides as follows:

> 114 *Court may presume existence of certain fact*
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.*
>
> *ILLUSTRATIONS*
>
> *The court may presume —*
>
> ...
>
> (g) *that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it*; (Emphasis added.)

[15] To protect confidential information, the court may grant a 'Protective Order' or 'Sealing Order'. It is decided in *Kingtime International Ltd & Anor v Petrofac E & C Sdn Bhd* [2019] MLJU 731 (judgment on post-trial discovery order and protective order, 29 July 2019), at para [20(1)], as follows:

> [20] *I am of the following view regarding a protective order:*
>
> (1) *a protective order may be granted pursuant to the court's inherent jurisdiction, court's inherent power and/or O 92 r 4 RC. Such a power is necessary to ensure that confidential information is disclosed to the court to enable the court to decide justly the case at hand and at the same time, to preserve the confidentiality of the information in question …* (Emphasis added.)

[16] In this case, the defendant had not obtained a redaction order in respect of the redacted material in the defendant's statements of accounts and the defendant's bank statements. Nor did the defendant seek a protective order in this case. Accordingly, an adverse inference under s 114(g) of the EA should have been made against the defendant regarding the defendant's redaction. In civil cases, the court may invoke an adverse inference under s 114(g) of the EA against a defendant — please see the judgment of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 at pp 34–35.

G. ALLEGED FULL PAYMENT

[17] I accept the learned SCJ's finding of fact which has rejected the alleged full payment. Such a factual finding is premised on the following evidence and reasons:

(a) if the alleged full payment were true, the defendant would have denied the three demands by relying on the alleged full payment;

(b) the defendant could have easily tendered the following evidence to prove the alleged full payment:

(i) copies of cheques which have been issued by the defendant in favour of the plaintiff regarding the alleged full payment ('the defendant's cheques');

(ii) payment vouchers would have been issued by the defendant regarding the defendant's cheques; and

(iii) the defendant's cheques would have been sent to the plaintiff with cover letters from the defendant to inform the plaintiff of the payment of the invoiced sums by way of the defendant's cheques; and

(c) an adverse inference under s 114(g) of the EA is made against the

defendant in respect of the defendant's redaction — please see the above para 16.

[18] In any event, in the exercise of this court's appellate jurisdiction, I am not satisfied that the SC has committed a plain error of fact in rejecting the alleged full payment.

H. IS THE PLAINTIFF ENTITLED TO CHARGE LATE FEE INTEREST?

[19] The following two UK cases have recognised that interest may be agreed between suppliers of goods or services ('suppliers') with their customers ('customers') in the course of business dealing between the parties:

(a) in *In re Henry, Marquis of Anglesey Willmot v Gardner* [1901] 2 Ch 548 at pp 551–552, Collins LJ (as he then was) decided as follows in the Court of Appeal:

> *In the present case the evidence consists of the acts and admissions of the deceased himself. These are facts about which there is no dispute. The bills were sent in to the testator; in those bills the claim for interest was made, and payments were made by him thereupon. All these facts are entirely beyond controversy; and, that being so, of what are they evidence? That would be a matter for a jury, and it could not be withdrawn from a jury. It seems to me that the reasonable inference from the facts is, that the deceased dealt with the claimants on the footing that he was to pay them interest after the lapse of three years.* (Emphasis added.); and

(b) Buckley J (as he then was) gave the following judgment in the High Court case of *In re WW Duncan & Co* [1905] 1 Ch 307 at pp 312–315:

> As a result of the course of dealing between the company and its customers, I think it is fully made out that the contract between the company and its customers was that interest should be allowed upon the amounts which were deposited by the customers by way of cover.
>
> ...
>
> *I think it is made out that there was, by reason of the course of dealing between the parties, a contract that the company would pay interest to the customer on the amount of his cover.* ...
>
> ...
>
> *Here the proof and the subsequent claim for interest in the winding-up are the form in which, under the circumstances, the customer asserts his right to work out the obligations arising under the contract, including, as it seems to me, his right in respect of interest. I think, therefore, the company turning out to be a solvent company, that the depositors are entitled to the interest, which, as part of the course of dealing, was payable by the company to them in respect of their cover.*
>
> ...

A *I think, therefore, the liquidator ought to pay to the creditors of the classes D, E, and F, out of the surplus assets of the company, after paying 20s. in the pound, interest according to the rate which prevailed during the course of dealings between the company and the customers - in every case on the amount which has been admitted to proof in respect, not of winnings, but of sums deposited as cover.* (Emphasis added.)

[20] I accept the above UK cases — if there is a course of business dealings between suppliers and customers wherein the customers have agreed to pay interest by reason of the customers' late payment for the goods or supplies in question, the suppliers are entitled to impose late payment interest. Such a legal position is fair and just because if the customer has delayed or refused to pay for the goods or services which have already been supplied, the supplier has suffered monetary loss ('supplier's loss') and should be compensated in the form of interest. The supplier's loss occurs because the supplier has been deprived of the benefit and use of money (which should have been paid by the customer to the supplier within the agreed time period).

[21] I am of the view that the plaintiff is entitled to charge late fee interest because there exists a course of business dealing between the plaintiff and defendant wherein the defendant has agreed to pay late fee interest ('course of business dealing'). The course of business dealing is proven by the following evidence and reasons:

(a) the invoices had expressly stated that, among others, the invoiced sums should be paid by the defendant to the plaintiff within 14 days from the date of the invoices and if the invoiced sums were not paid within the stipulated time period, late fee interest would be imposed;

(b) the following conduct of the defendant supports the course of business dealing:

(i) after the plaintiff had first imposed late fee interest in the invoice, the defendant should have objected to the late fee interest and the defendant's employees should have refused to seek further services from the plaintiff. However, the defendant's employees continued to seek the services without any objection to the late fee interest by the defendant; and

(ii) the defendant's part payments had been made without any protest against the late fee interest.

The defendant's aforesaid conduct is relevant under s 8(2) of the EA which provides as follows:

8(2) *The conduct of any party*, or of any agent to any party, *to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against

whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto*. (Emphasis added.); and

(c) the course of business dealing was not brief. Instead, the course of business dealing took place over a period of two years and ten months (services were provided by the plaintiff to the defendant from 1 February 2013–30 November 2015 (termination of services)).

I. WHETHER THE DEFENDANT IS ESTOPPED FROM DENYING TOTAL OUTSTANDING BALANCE

[22] I am of the view that the learned SCJ has correctly invoked the equitable doctrine of estoppel to support this action. As clearly provided in the invoices, all items and balances shown in the invoices 'will be considered correct unless (the plaintiff is) notified in writing of any discrepancies within 14 days' from the date of the invoices. The defendant did not notify the plaintiff at all that the invoiced sums and late fee interest were wrongly or erroneously stated in the invoices (the defendant's omission'). The defendant's omission had caused detriment to the plaintiff because the plaintiff continued to provide the services for the period (services) without any substantial payment by the defendant. As such, the defendant is now estopped by the defendant's omission from denying the total outstanding balance, either in respect of the invoiced sums or late fee interest.

I rely on Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344; [1995] 4 CLJ 283 at pp 294–297, as follows:

> *The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.*
>
> ...
>
> *We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. The plaintiffs too may have recourse to it.* ...
>
> ...
>
> *Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence.*
>
> ...
>
> *Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and re-statement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel: the second has to do with the requirement that such a*

A *person should have acted to his detriment*. The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, *having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term* B *includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation … that it would be unconscionable for the representor thereafter to enforce his strict legal* C *rights'*. (*Per Robert Goff J in Amalgamated Investment* at p 105 of the report.)

…

We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before D *the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case it would be unjust to permit the representor or encouragor to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the* E *determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment.* (Emphasis added.)

[23] It is to be noted that s 115 of the EA provides for the application of the estoppel doctrine — please see *EON Bank Bhd v Sri Tanjong Travel Sdn Bhd & Ors* [2014] 5 AMR 693 at paras [64]–[65]. I now reproduce s 115 of the EA: F

> *When one person has by his* declaration, act or *omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he* nor his representative in interest *shall be allowed in any suit or proceeding between himself and that person* or G his representative in interest *to deny the truth of that thing*. (Emphasis added.)

In addition to the above case law on the application of equitable estoppel, by reason of s 115 of the EA, the defendant is also estopped by the defendant's omission from denying the total outstanding balance, either in respect of the H invoiced sums or late fee interest.

J. OUTCOME OF THIS APPEAL

[24] Premised on the above evidence and reasons, I have no hesitation to I dismiss this appeal with the following order:

(a) SC judgment is affirmed; and

(b) subject to an allocatur fee:

(i) the defendant shall pay costs for this appeal in the sum of RM7,000 to the plaintiff ('costs'); and

(ii) the defendant shall pay to the plaintiff interest at the rate of 5%pa on the costs from the date of my oral judgment until the full payment of the costs.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh